No. 14-1146

In the
Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, Individually and On Behalf of All Others Similarly Situated, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a),[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner. PLF was founded more than 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of class action procedures which harm businesses, and stifle entrepreneurialism and job creation. *See, e.g.*, *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1970 (2012); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

"The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). The federal adversarial system is replete with procedural protections that ensure an individual's right to participate throughout litigation, and this Court has deemed a fair and adequate opportunity to be heard the most basic requirement of due process of law. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

While the class action device offers certain benefits—such as efficiency and deterrence—it also limits the ability of class members to participate in judicial proceedings. Class actions lawsuits are thus, by their nature, in tension with due process. Bearing that in mind, this Court has sought to protect the due process rights of both plaintiffs and defendants by requiring careful enforcement of Fed. R. Civ. P. 23's class certification requirements. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). Such vigilance is all the more important given that class certification can have a coercive effect on defendants, and is often outcome-determinative. *See Newton v. Merrill Lynch, Pierce, Feiner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001).

One important component of Rule 23 is the requirement of commonality. Classes may not be certified unless "there are questions of law or fact common to the class" *and* those common questions are "capable of classwide resolution." *Dukes*, 131 S. Ct. at 2551. In this case, the common issue—whether Tyson is liable to the class members for unpaid overtime—cannot be resolved on a classwide basis

because the answer depends on myriad facts unique to each plaintiff. The class contends that Tyson owes the members overtime pay for time spent donning and doffing work equipment. *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 794 (8th Cir. 2014). But the class members worked in different positions, and the items they wore depended on their individual responsibilities, as well as their personal preferences. Pet. Br. at 5. Different employees chose to wear different materials, in different combinations, *id.*, and the time they spent donning and doffing depended not only on what they wore, but how they chose to put the pieces on. Tyson compensated employees for at least some of this time in different amounts, for different departments, during different years. *Id.* Yet, despite the fact that Tyson's liability could not be determined without reference to these many unique facts, the trial court certified the class. *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-CV-04009-JAJ, 2011 WL 3793962, at *1 (N.D. Iowa Aug. 25, 2011) (denying motion for decertification).

Tyson was entitled to an individual assessment of liability based on the different circumstances of each plaintiff. But once the class was certified, the plaintiffs sought to prove liability and damages through a formula based on the average time it took a *sample* of the class to don and doff their equipment. Pet. Br. at 8. Deciding liability and imposing damages based on extrapolations from a sample of the class masks the differences among plaintiffs, and deprives defendants of their right to present individualized defenses. *Dukes*, 131 S. Ct. at 2555. The class should not have been certified, and a formula should not have been used to impose liability. The decision below must be overturned.

ARGUMENT

I

CLASS ACTION CERTIFICATION MUST BE SCRUTINIZED CLOSELY BY COURTS

A. Courts Must Strictly Enforce Rule 23's Commonality Requirement to Protect the Due Process Rights of All of the Parties

Essential to the American judicial system is the right to be heard and to participate in court proceedings. *Martin v. Wilks*, 490 U.S. 755, 762 (1989). But the class action device turns the normal adversarial system "on its head." Jay Tidmarsh, *Superiority As Unity*, 107 Nw. U. L. Rev. 565, 568 (2013). The claims of several individuals are consolidated, the process is streamlined, and the class members effectively lose the ability to decide "whether, when, where, with whom, and against whom to file." *Id.* Class members lose their ability to choose their counsel. And nearly every decision counsel makes benefits some class members at the expense of others. *See* John C. Massaro, *The Emerging Federal Class Action Brand*, 59 Clev. St. L. Rev. 645, 675-76 (2011) (demonstrating how in a fraud case, counsel's decision to emphasize certain facts affects class members disproportinately). Moreover, the aggregation of claims detracts from the acknowledgment of each plaintiff's particular injuries, a value recognized as a legitimate end in itself, apart from the goal of compensation for injuries. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions*

and Legislative Initiatives, 113 Harv. L. Rev. 1806, 1812-13 (2000).

Though in some class actions, class members are entitled to opt out and, in others, are even required to opt in, in practice, class members often do not appreciate the significance of such a decision, or exercise their right to opt out. Tidmarsh, *supra*, at 569. Thus while the class action device can provide benefits to class members, it also minimizes their ability to participate, and jeopardizes their due process rights—often without their consent.

In addition to compromising the due process rights of plaintiffs, the class action device also endangers the rights of defendants. Defendants have the right to pay damages only to those whom they actually harm. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) (defendants have "substantive right to pay damages reflective of their actual liability."). But "[t]he degree to which the factual assertions in the class complaint truly apply to each specific individual in the class will rarely be known" at the outset of litigation, and defendants' ability to make "idiosyncratic defenses arising from the specific circumstances of each plaintiff's situation" will often be impractical. Massaro, *supra*, at 677. Indeed, a class action defendant "may never get . . . due process unless the defendant is allowed to confront each class member in court, a possibility that goes against the very objective of class actions." Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 509 (2012).

A properly defined class is necessary to realize the procedural protections and benefits that the class action device offers. Individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Commonality ensures that the named plaintiffs and the absent class members' interests are aligned, and that class counsel and plaintiff advocate for outcomes that will benefit *all* class members. *Dukes*, 131 S. Ct. at 2550. Without the commonality requirement, class members with stronger-than-average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. *See, e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Commonality also reduces the likelihood that class members will be over- or under-compensated. By ensuring that damages awards are targeted to compensate what class members actually lost, commonality also protects the due process rights of defendants. Amy Gibson, Cimino v. Raymark Industries: *Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 Baylor L. Rev. 463, 475 (1994). Most importantly, commonality protects defendants' right to present individualized defenses, and to be free of liability to those they have not actually harmed. *Dukes*, 131 S. Ct. at 2555.

This Court has instructed courts to thoroughly analyze whether commonality and Rule 23's other requirements have been met before granting class certification. In *Comcast*, 133 S. Ct. 1426, the Court held that certification must be premised on evidence, not just the pleadings. Courts must make a "rigorous"

analysis into certification, even if that inquiry overlaps with the merits of the underlying claim. *Id.* at 1432. Again, this requirement is rooted in due process. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim.").

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011), emphasized that adherence to Fed. R. Civ. P. 23 is necessary to satisfy due process. In that case, the Court warned that imposing class arbitration without consent may violate the due process rights of absent class members precisely because, unlike courts, arbitral forums do not provide for protections like those provided for in Rule 23. Class actions, "by their very nature require a level of expertise in procedure" which must be provided in order to satisfy due process. Massaro, *supra*, at 683. Courts provide that expertise by enforcing Rule 23. *Concepcion*, 131 S. Ct. at 1746.

Thus, though the class action offers certain advantages, courts must scrutinize motions for class certification closely to protect the due process rights of both plaintiffs and defendants. These requirements may make it more difficult to certify a class, but that difficulty is the price our system pays for a fair administration of justice. Indeed, the Due Process Clause was designed exactly for the purpose of "protect[ing] the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

B. Courts Must Police Class Certification Closely Because of Certification's Coercive Effect on Defendants

Once a class is certified, litigation ending in a trial on the merits is "an exceedingly rare beast." *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 12 (2014). Given that certification often means defendants run the risk of enormous damages awards, certification places them under irresistible pressure to settle. *See Newton*, 259 F.3d at 164 (after certification, defendant companies are under "hydraulic pressure" to settle). Few defendants have the stomach to proceed after certification, given the risk. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). And "[e]ven if a business litigates and wins, class actions can be extremely damaging to the business' finances and reputation."[2] Matthew Grimsley, *What Effect Will* Wal-Mart v. Dukes *Have on Small Businesses?*, 8 Ohio St. Entrep. Bus. L.J. 99, 100 (2013). Thus, class certification determinations are often outcome-determinative. *See Manual for Complex Litigation* § 30.1 at 212 (3d ed. 1995).

Because of its coercive effect, the class action procedure tends to result in targeted businesses facing what federal appellate judges bluntly term "blackmail."

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[2] Even though Wal-Mart won the certification issue in *Dukes*, "[a]midst mounting negative publicity, Dell, General Electric, and Starbucks toppled Wal-Mart from its perch atop the rankings to fourth place in Fortune's 2005 survey of America's Most Admired Companies." Winnie Chau, *Something Old, Something New, Something Borrowed, Something Blue and A Silver Sixpence for Her Shoe*: Dukes v. Wal-Mart *& Sex Discrimination Class Actions*, 12 Cardozo J.L. & Gender 969, 994 (2006).

Rhone-Poulenc Rorer, 51 F.3d at 1298; *In re GMC Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995); *see also West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). This is true even when defendants are faced with weak claims, *Concepcion*, 131 S. Ct. at 1752, and defendants have a meritorious defense. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). When damages are aggregated and decided in one fell swoop, the risk of error will be too severe to accept. Thus, this Court and other courts have warned of the risk of "in terrorem" settlements that class actions elicit. *Id.*

Permitting certification in cases like this one, where it is not even certain that many class members have been injured *at all*, will flood the federal courts with "lawyers' lawsuits." The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). This danger is compounded when plaintiffs who have not been injured may join together in a class. "If passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984). In light of the coercive effect of class action certification, it is particularly important that courts scrutinize certification to ensure adherence to Article III so that defendants are not unfairly pressured into settling a case the named plaintiff had no right to bring in the first place.

The decision to certify is typically the defining moment in the litigation. By ensuring that classes are only certified in appropriate circumstances and where Article III is satisfied, the class certification stage acts as a bulwark against frivolous litigation intended to secure settlements. A court should order class certification only after conducting a rigorous analysis to ensure that the plaintiff seeking class certification has satisfied Rule 23's prerequisites.

II

THE LOWER COURT SHOULD NOT HAVE GRANTED CERTIFICATION IN THIS CASE

A. Common Issues Do Not Predominate

The class action device was created to allow a large group of individuals who have each suffered the same injury by the same defendant to group their claims together in a way that makes litigation economically efficient. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 477-78 ("[T]he theory of class actions is to take a weak signal and to amplify it by aggregating small claims that would not otherwise be pursued individually, lowering the cost per individual suit."). It does not exist to allow claims of different natures and different degrees to be lumped together under a single label so as to confront a defendant with a wide variety of different allegations involving each class member's individual circumstances, thereby making defense impracticable. That kind of aggregation is not aggregation, but distortion, "the chief effect of which is to facilitate a finding of [liability] in cases where it is highly unlikely

to have occurred" as applied to every member of the class. Epstein, *supra*, at 509.

In order to qualify for certification under Fed. R. Civ. P. 23, a case must not only involve common questions, but the court must be able to answer those questions for the whole class. *Dukes*, 131 S. Ct. at 2551. Courts have therefore taken care to avoid certifying overtime cases in which a large group of plaintiffs alleges that a company failed to pay overtime, where each plaintiff performed different tasks and worked different hours, and where proof of a common policy alone would not necessarily prove that the defendant is liable to each class member. *See, e.g., Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 (9th Cir. 2009) (affirming denial of certification in overtime case); *Weigele v. FedEx Ground Package Sys., Inc.*, 267 F.R.D. 614 (S.D. Cal. 2010) (decertifying class that alleged failure to pay overtime because plaintiffs would need to "make a factual determination as to whether class members . . . actually perform[ed] similar duties," and were therefore all entitled to back pay). In such a case, there is no way to answer the question of liability without analyzing the individual circumstances of each plaintiff, and common questions do not "predominate."

For example, in *Vinole*, 571 F.3d at 947, the putative class alleged that the defendant mis-classified them as "exempt" employees and, as a result, impermissibly failed to pay them overtime and other wages. Liability turned on whether each employee was properly classified as exempt. But the answer to that question depended on the tasks the employees performed, and all of the plaintiffs had been granted "almost unfettered autonomy" to do their jobs.

Accordingly, the employees varied greatly in their daily routines. Thus, the common question could not be answered on a class-wide basis, because the answer depended on circumstances that varied from employee to employee. In order to determine actual liability, the court would "need to hold several hundred mini-trials with respect to each [employee]'s actual work performance." *Id.*

The plaintiffs argued that the burdens of such individualized adjudication could be mitigated through the use of " 'innovative procedural tools' such as questionnaires, statistical or sampling evidence, representative testimony, separate judicial or administrative mini-proceedings, [or] expert testimony." *Id.* The trial court denied certification and the Ninth Circuit affirmed, on the basis that the issue of liability "requir[ed] a fact-intensive, individual analysis of each employee's exempt status." *Id.*; *see also McLaughlin*, 522 F.3d at 231 (rejecting certification where gross damages would have to be "roughly estimated" and defendants "only subsequently" would be able to challenge the individual claims); *Newton*, 259 F.3d at 191, *as amended* (Oct. 16, 2001) (no certification where plaintiffs could not prove reliance or injury on classwide basis unless a formula was used). Where liability turns on the unique circumstances of each plaintiff, the question of liability cannot be answered on a class-wide basis.

The same is true here. Resolution of this case would require the Court to inquire not only into whether Tyson had a policy of not paying for donning and doffing, but also what kind of equipment each employee donned and doffed, how much time it took

each individual to do so, and whether Tyson did compensate the individual for that time. In other words, the question of liability is entirely dependent on factors unique to each individual plaintiff. It was precisely because those factors differ in legally significant ways that the lower court used its statistical technique as a substitute for commonality. But Due Process does not allow such a substitute.

B. Defendants Were Entitled to Pursue Individualized Defenses Based on the Differences Between Class Members

Defendants are entitled to pursue individual defenses based on the differences between the plaintiffs.[3] *Dukes*, 131 S. Ct. at 2561; *Newton*, 259 F.3d at 191-92 ("Actual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member."). Commonality protects that right. Where class members are similar, adjudication can be streamlined and presenting individual defenses is much easier. But where, as here, the plaintiffs are dissimilar and therefore not

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[3] As commentators have noted, this is not just a matter of due process, but an Article III standing requirement. The requirement that a plaintiff prove defendant injured her

> is not immediately concerned with whether a defendant ought to pay for her wrongs, either as a matter of punishment or deterrence. Rather, it is a requirement of standing[.] When defendant D argues that plaintiff P has suffered no injury . . . D is arguing that this plaintiff ought not be permitted a right of action because, even granted that D acted wrongfully, P has not actually been wronged by her, and that P having been wronged by D is a prerequisite to being entitled to legal recourse against her.

John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 Va. L. Rev. 1625, 1643-44 (2002).

common, streamlining the process obscures the individual differences between plaintiffs and violates due process.

In *Dukes*, this Court overturned the lower court's use of trial-by-formula. 131 S. Ct. at 2560. In that case, the court of appeals had allowed the plaintiffs to determine the amount of back pay owed to the class as a whole by taking a sample set of the class members, determining the average award to those members, applying that amount to each class member, and coming up with an aggregate amount. *Id.* The Court rejected this process because it denied Wal-Mart the ability to present individual defenses. Likewise in *Summers*, 555 U.S. at 497-98, the Court rejected the use of statistical probabilities in establishing harm for purposes of Article III standing. The Court emphasized that the federal judiciary can resolve only actual disputes between actual persons, and that substituting statistical probabilities for a showing of real injuries would "make a mockery of our prior cases." *Id.* at 498.

Here, the trial and appellate courts sanctioned trial-by-formula, and imposed liability based on statistics derived from a sample of the class. Those statistics were then applied to the class as a whole to decide liability and determine damages. Whether Tyson was liable to the class—and if so, for how much—depended on the unique characteristics of each class member. Tyson was entitled to pursue individualized defenses based on those differences, and the trial-by-formula allowed below violates due process.

Statistical extrapolations simply cannot substitute for the individual weighing of the merits of specific

allegations. Even in mathematics, where they are a helpful tool, statistical models are, at best, easily misinterpreted, *see* Gary King, *How Not to Lie with Statistics: Avoiding Common Mistakes in Quantitative Political Science*, 30 Am. J. Pol. Sci. 666 (1986), and at worst, easily manipulated. *See* Darrell Huff, *How to Lie With Statistics* (1954).

Moreover, statistics, which rely on certain assumptions about the fungibility of cases and regularities between categories of data points, have no such parallel in law, where a plaintiff is required to prove each element of her case against each defendant. *See* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 Iowa L. Rev. 1001, 1052 (1988) ("An abstract ex ante causal probability associated with some possibly applicable causal generalization is not evidence of what actually happened on the particular occasion.").

For example, the presumption of innocence in law has no counterpart in statistics. The Constitution entitles defendants to confront their accusers and to a judicial determination of their own individual guilt or innocence. Criminal defendants could not be subjected to imputed guilt based on probabilities drawn from statistical patterns of guilt or innocence established in other cases or in hypothetical cases.

The same is true of civil defendants. As the Maine Supreme Court noted over a century ago,

> [q]uantitative probability . . . is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of the dice there

> is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown.

Day v. Boston & M.R.R., 52 A. 771, 774 (Me. 1902).

For instance, if two people are alone in a room with a valuable piece of artwork that is later found to be destroyed, there is 50% chance that each person destroyed it. To apportion liability on that basis without allowing either person to disprove the allegation that they committed the wrong, however, would violate due process. Statistics are tools that can be used to assess likelihood, but they are no substitute for the adversarial process of determining fault based on evidence and causation.

While statistical models may contribute to the plaintiffs' claim that an illegal policy is at work, plaintiffs must never be relieved of their burden of proving that the defendant committed the wrong, *i.e.*, that they each were injured by the defendant's acts—and that the damages approximate the injury caused. This Court recently reiterated that the Due Process Clause requires a court to focus on the liability of particular defendants to particular plaintiffs, and does not allow a court to base its decisions on wrongs allegedly done to others. *Dukes*, 131 S. Ct. at 2561; *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007); *see also* Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v. Williams, 2 Charleston L. Rev. 433, 450 (2008) ("[W]hile statistical sampling may provide more

detailed evidence of harm to others for purposes of the reprehensibility analysis, incorporating that information may ultimately be more prejudicial than probative to a jury likely to mistakenly infer they can punish for harm to others."). The possibility or even likelihood that an individual has been injured in a concrete and particularized way does not show an *actual* injury.

In addition, trial-by-formula will necessarily overestimate the damages owed to some plaintiffs and underestimate the damages due to others. Even if the formula accurately determines the defendant's total liability, by mismatching the damages owed, using a formula is problematic from a due process standpoint for both defendants *and* plaintiffs. Massaro, *supra*, at 674. Plaintiffs should be compensated according to their injury, and defendants should only pay for the damages they actually caused. *See* Tidmarsh, *supra*, at 1470 ("[T]he linkage between a plaintiff's harm and a defendant's causal contribution to that harm is the only justification for redistribution from a defendant to a plaintiff."). Imposing damages by formula undermines both principles.

Here, the lower courts sanctioned exactly the type of trial-by-formula *Dukes* and *Summers* rejected. By basing liability on the average time that it took a sample of the class to put on and take off their unique equipment, then calculating damages in the aggregate by applying that formula to every member of the class, the courts denied Tyson its right to "*individualized* determinations of *each* employee's eligibility for back pay." *Dukes*, 131 S. Ct. at 2560. Though affording Tyson that right may be inconvenient, and undermine the efficiency and ease that the class action device is

meant to provide, "[t]he requirement of 'due process' is not a fair-weather assurance." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951). The lower courts' application of trial-by-formula to determine liability and damages must be overturned.

CONCLUSION

The decision of the Eighth Circuit should be *reversed*.

DATED: August, 2015.

Respectfully submitted,

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